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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 217.

WILLIAM STEVENS,

Petitioner,

vs.

THE VESSEL WHITE CITY, HER ENGINES, ETC.,

Respondent.

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

WILLIAM STEVENS,
Petitioner,
vs.
The vessel WHITE CITY, her engines, etc.,
Respondent.

No. 217
October Term
1931

BRIEF FOR RESPONDENT

This is a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit reversing a decision of the District Court for the Southern District of New York (Woolsey, *J.*).

The cause of action arose out of unexplained damage to the *Drifter,* a 45 foot motor yacht, while in tow of the excursion boat *White City* from Morris Heights, New York, to Port Newark in Newark Bay, New Jersey. The damage consisted of an indentation in the yacht's starboard side, amidships, at the water line, 6-10 inches in diameter (R. 68-9, 71, 55, 76).

The libel was filed by an assignee of the owner of the *Drifter* against the *White City,* following an unsuccessful action on the same cause of action in the Municipal Court of the City of New York (R. 90, 230-1).

FACTS.

The owner of the yacht *Drifter** contracted with one Alexander Simpson for the towage of the yacht and her cradle from the builder's yard at Morris Heights, New York, to alongside the *Suscalanco,* the steamer on which she was to be shipped, at Port Newark. Simpson engaged the excursion boat *White City,*† to do the towing. On the morning of October 19, 1925, the *White City,* in charge of a crew of three, including her master, took the *Drifter* and her cradle in tandem tow at Morris Heights, the yacht directly astern and the cradle astern of the yacht, both on 40 foot hawsers (R. 45-6, 53, 60-2). The yacht was manned by a "boatman" or "bargee", Weston, who was placed aboard by the builders, representing the owner, to remain in charge "until the boat arrived at the steamer and the steamship company took hold of it". His duties were those of an ordinary bargee and included that of steering the tow (R. 42-3, 71, 75).

The tug and her tow proceeded down the Harlem and East Rivers, through the Bay and the Kills to Newark Bay. Off Hell Gate the cradle broke loose, and the tug was obliged to stop and manoeuver to pick her up again. She then continued on her voyage and while proceeding through the Kills off Bayonne, New Jersey, about 3.30 P. M., the steamer *Suscalanco,* on which the tow and her cradle were to be shipped, was met and passed bound to sea. The tugmaster decided to go ashore and telephone for instructions, and accordingly put into Fisher's Dock, Bayonne. Having been informed that the tow would be shipped by a later steamer, he decided to spend the night at Bayonne and

* Also referred to in this brief as the "tow."

† Also referred to in this brief as the "tug."

to proceed to Port Newark in the morning (R. 62-3, 75). Tug and tow were therefore tied up at Fisher's Dock, Bayonne, inside in "smooth" water and fenders put over the yacht's side to keep her clear of the dock (R. 64). The bargee, Weston, not wishing to stay aboard, announced that he would leave, to which the tugmaster did not object, and he accordingly left (R. 65, 304).

The following morning the tug and tow continued on to Port Newark. As the bargee had not returned, the tow was steered by a deckhand from the tug. Upon arrival at destination an indentation 6-10 inches in diameter was found on the yacht's starboard side amidships at the waterline (R. 55, 68, 76).

It was suggested at the trial that a submerged object or piece of driftwood might have caused the damage (R. 69-70). However, neither petitioner's nor respondent's witnesses could explain just how the damage occurred (R. 229).

At the trial respondent produced the deckhand of the tug, and offered in evidence the testimony of Rhodes, the tugmaster, and Simpson, who engaged her, given in the Municipal Court action, both men having died in the interim (R. 70); but on objection of petitioner, whose present counsel had cross-examined both witnesses in the Municipal Court, this testimony was excluded. Petitioner failed to produce the bargee Weston (R. 70, 7-8).

Decisions Below

The District Court held that the contract of towage constituted a bailment, and that a presumption of negligence arose by reason of the tow arriving at destination in damaged

condition and that unless the tug could *explain* the damage, she was liable (R. 232).

The Circuit Court of Appeals, in reversing the decision of the District Court and dismissing the libel, held that the tug was not a bailee and that no presumption of negligence arose from the mere injury to the tow, and that the burden of proving negligence rested upon the libellant (R. 304-8).

The District Court decision is reported at 35 Fed. 2nd 1006, 1929 A. M. C. 1628 (Summary) and that of the Circuit Court of Appeals at 48 Fed. 2nd 557, 1931 A. M. C. 844.

Summary of Argument

We shall argue that

1. The towage contract did not constitute a bailment and no presumption of negligence arose from the unexplained injury to the tow; and

2. Even had the tug been a bailee, any presumption arising from the delivery of the tow in damaged condition was rebutted by the proofs.

POINTS

I. THE TOWAGE CONTRACT DID NOT GIVE RISE TO A BAILMENT AND NO PRESUMPTION OF NEGLIGENCE AROSE BECAUSE THE TOW SUSTAINED DAMAGE.

It has long been established by this Court that a tug not holding herself out as a common carrier and engaged in a simple contract of towage, is not a bailee, and that no presumption of fault against the tug arises from the mere fact of damage to the tow. The towage contract requires only that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.

In *Transportation Line* v. *Hope,* 95 U. S. 297, plaintiff sought to recover for the loss of a barge which the defendant had undertaken to tow from Jersey City to New Haven. The barge sank before reaching her destination. This Court said:

"While it was very well to ask a charge that the transporter of the boat was *not a bailee,* and perhaps that the boat was not within his exclusive control, and that only ordinary care and diligence were required on his part, it was quite incorrect to ask a charge that the boat was within the possession and the exclusive care and control of her owner.

"The transportation compa v did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply. It did not employ or pay the master and the men in charge of her, nor did it exercise that internal control of her cargo, its storage, its protection, and the like, which belonged to a bailee, and it was not bound to the extraordinary duties and liabilities of a common carrier. *Alexander* v. *Greene,* 3 Hill (N. Y.), 9" (pp. 299-300). (Italics ours.)

In *The Steamer Webb,* 14 Wall. 406, this Court said:

"It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of

common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence, or unskilfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services" (p. 414).

In *The L. P. Dayton,* 120 U. S. 337, the tow of one tug collided with the tow of another tug. This court again laid down the rule that no presumption arose from the mere fact of damage to the tow, saying:

"In favor of the injured tow, the libellant in this case, there is no presumption of fault as against either, nor against both jointly. There is no presumption against the *Bowen,* for the reason we have already stated; there is none against the *Dayton,* because on her behalf all the alleged negligence is denied, and the contrary allegations of the libel cannot be legally maintained merely by corresponding allegations in the answer of the *Bowen.* To hold otherwise would require that in every case, as between the tow and its tug, the latter should be required affirmatively to establish its defense against the presumption of its negligence. There is no ground, in reason or authority, for making such an exception to the general rule, which requires the plaintiff, in the first instance, to establish by proof the allegations of its complaint. It does not tend to establish such an exception that it appears by the record that one or the other of the respondents must have been so in fault as to be liable for the consequences. It still remains that there is a controversy as to which of the two is guilty, and no decree can pass without affirming the liability of one or both. That affirmation must stand upon proof, unless it appears on the record which one of the two is at fault, or that both are" (pp. 351-2).

See also *The J. P. Donaldson,* 167 U. S. 599.

The above rule has been repeatedly followed in the various circuits. We shall set forth the cases below grouped by circuit.

SECOND CIRCUIT

Hildebrandt v. *Flower Lighterage Co.*, 277 Fed. 436 (affirmed 277 Fed. 438):

"In my judgment, that burden has not been met; there has been no showing of negligence. It may be that the boat was badly shifted by the tug. It may be that the damage was done in the shifting; but there is no proof of that, and while, of course, the tug is not liable, in the absence of proof that the damage occurred because of faulty shifting, in my judgment the respondent is not liable for the fault of shifting, if there was fault of shifting, on the part of the tug" (p. 437).

The Greenwich, 270 Fed. 42 (C. C. A.):

"The burden was upon the libelant to prove fault on the part of the tug. This it has not done. The claim of negligence has failed of proof. The tug was not an insurer, and so the mere sinking while in her custody does not establish the case. *The Winnie*, 149 Fed. 725, 79 C. C. A. 431; *Aldrich* v. *Penn. R. R. Co.*, 255 Fed. 330, 166 C. C. A. 500" (p. 44).

Aldrich v. *Pennsylvania R. Co.*, 255 Fed. 330 (C. C. A.):

"The burden is on the one who asserts negligence to prove it, and the mere fact that a barge has been damaged while in tow does not raise the presumption that the tug has been at fault. *The Winnie*, 149 Fed. 725, 79 C. C. A. 431; *The R. B. Little*, 215 Fed. 87, 131 C. C. A. 395.

* * * * * * *

"No one seems to know, nor, indeed, do appellant's witnesses pretend to know, how this damage was caused. In the absence of some proof showing that the tug caused it, negligence cannot be presumed" (p. 331).

The Clarence L. Blakeslee, 243 Fed. 365 (C. C. A.):

"The mere fact that a tow receives injury does not render the tug liable; libellant must affirmatively prove negligence, which is not presumed merely because the injury is not otherwise accounted for. *The Winnie*, 149 Fed. 725, 79 C. C. A. 431" (p. 366).

The R. B. Little, 215 Fed. 87 (C. C. A.):

"It seems to us that the burden is on the libellant to show some negligence on the part of the tug and that until this is done, the burden of proof does not shift. There is nothing in the testimony here to show that the tug was guilty of fault. It is all left to guesswork and speculation. The argument is that the barge was injured at some time, probably while being towed by the tug, *ergo* the tug is liable. In other words the tug may be held liable for an injury which she did not cause or aid in causing. No one knows or pretends to know how this injury was caused and until some proof is produced that the tug caused it, it seems to us she should not be held liable" (p. 88).

The Winnie, 149 Fed. 725 (C. C. A.):

"The burden was on the libellant to prove fault on the part of the tug; in this he failed. * * * The libelant alleged negligence and failed to prove it. It was then the duty of the court to dismiss the libel. * * * The tug was not an insurer, and cannot be held liable merely because the *Fermoil* received an injury while in her custody" (pp. 726-7).

See also:

The W. H. Baldwin, 271 Fed. 411, 413 (C. C. A.);

THIRD CIRCUIT

Delaware Dredging Co. v. *Graham,* 43 F. (2d) 852 (E. D. Penn.).

FOURTH CIRCUIT

Southgate v. *Eastern Transp. Co.,* 21 Fed. (2d) 47 (C. C. A.):

"The happening of an accident to a tow does not of itself raise any presumption of negligence on the part of the tug; and the burden of proof is upon the party seeking to charge the tug with liability therefor. The towage contract requires no more than that one who undertakes the service shall carry out his undertaking with the degree of caution and skill which prudent navigators usually employ in similar services" (p. 49).

The Atlantic City, 241 Fed. 62 (C. C. A.):

"It is well settled that a tug, or other vessel acting as such, is not a common carrier. *The Margaret,* 94 U. S. 494, 24 L. Ed. 146. She is only bound to exercise reasonable care and skill in performing the service which she has undertaken. The fact, therefore, that an accident happens to the tow does not of itself give rise to any presumption of negligence on the part of the tug, and the burden of proof is upon the party seeking to charge the tug with liability" (p. 64).

The Ashwaubemie, 3 F. (2d) 782 (C. C. A.):

"The question turns almost entirely upon the facts, and there is but little dispute about the law. As contended for by the libelant, the mere fact that a tow receives injury does not render the tug liable. Negligence must be affirmatively shown. The tug is not an insurer of the safety of the tow, nor responsible for errors of judgment on the part of the master, if a competent seaman, exercising due care. Negligence is not presumed from the mere happening of an accident, and the burden of proof of negligence rests upon those seeking to establish the tug's liability therefor. *The Atlantic City* (C. C. A. 4th Cir.) 241 F. 62, 154 C. C. A. 62; *The Clarence L. Blakeslee,* 243 F. 365, 156 C. C. A. 145; *The W. H. Baldwin* (C. C. A.) 271 F. 411" (p. 783).

FIFTH CIRCUIT

El Rio, 162 Fed. 567 (D. C. S. D. Alabama);

Wilson v. *Sibley,* 36 Fed. 379 (D. C. S. D. Alabama);

The Pacific Maru, 8 Fed. (2d) 166 (D. C. S. D. Georgia E. D.);

The Buttercup, 8 Fed. (2d) 281 (D. C. E. D. Louisiana.

SIXTH CIRCUIT

The Kunkle Bros., 211 Fed. 540 at 543 (D. C. N. D. Ohio E. D.).

SEVENTH CIRCUIT

The W. H. Simpson, 80 Fed. 153 (C. C. A.):

"There is here no presumption of negligence arising from the fact of the disaster, and the burden of proof is put upon the libelant to satisfy the court upon the evidence presented and upon the reasonable probabilities of the case that the tug was guilty of the fault charged through failure to exercise ordinary skill and care" (pp. 154-5).

NINTH CIRCUIT

Pedersen v. *Spreckles,* 27 Fed. 938, 944-5 (C. C. A.):

"The general rule as to the duty and liability of a tug in towing is clearly expressed in *The Webb,* 14 Wall. 406, 414.
* * *

"The law applicable to this case is that both the tug and the tow must exercise reasonable care and skill. While the tug was bound to exercise reasonable care and skill, she had the right to expect corresponding care and skill on the part of the schooner. *The Jacob Brandow,* 39 Fed. 831; *The Sagua* v. *The Grace,* 42 Fed. 461; *The Ciampa Emilia,* 46 Fed. 866, 868; *The Invertrossachs,* 8 C. C. A. 87, 59 Fed. 194, 198; *The Margaret,* 5 Biss. 353, Fed. Cas. No. 9,068; *The Allegiance,* 6 Sawy. 68, Fed. Cas. No. 207; *Sproul* v. *Hemmingway,* 14 Pick. 1. The contention of appellant that the happening of the accident raised a presumption of negligence on the part of the tug cannot, therefore, be sustained. The burden of proof in this case was upon the appellant to show affirmatively, by a clear preponderance of the evidence, that the tug was guilty of negligence" (pp. 944-5).

The A. R. Robinson, 57 Fed. 667 (D. C. D. Washington, N. D.);

The Sea Lion, 12 Fed. (2d) 124 (D. C. N. D. California, S. D.).

The cases relied upon by petitioner are either not in point or are not authoritative.

In *McWilliams Bros. Inc.* v. *Director-General,* 271 Fed. 931 (Brief, p. 11), negligence was proved against the tug, and reference to the tug as "merely a bailee for hire" was *dicta contra* to numerous decisions in the same Circuit (2nd) before and since (see decision below R. 305-8).

The reference to Hughes on Admiralty, 2nd Edition, page 129, that a tug is "only an ordinary bailee liable for ordinary negligence" (Brief, p. 11) is misleading. Petitioner should have added the sentence immediately following, which reads:

"It is also settled that the occurrence of an accident raises no presumption against the tug, and that the burden is on the complaining party to prove a lack of ordinary care."

In re Pennsylvania R. R. Co. (*Brinton and Drifting Barges*) 48 F. (2d) 559; 1931 A. M. C. 852 (Brief, p. 11), was not a case of towage but a bailment to a railroad company, because of certain loading and wharfage provisions connected with the particular form of contract. The opinion was written by Learned Hand, *J.*, who wrote the decision below in the instant case.

The Princeton, 19 Fed. Cases 11433a (Brief, p. 16), was a decision of the District Court for the Southern District of New York in 1851 before the decision of this Court in *The Webb* in 1871 (14 Wall. 406).

Bust v. *Cornell,* 24 Fed. 188 (Brief, p. 16), a decision of the old Circuit Court in New York in 1885, is overruled by the later decisions in the Second Circuit.

D. Newcomb, 16 Fed. 274 (Brief, p. 16), a decision in the Western District of Pennsylvania in 1883, the question of burden of proof was not involved because the negligence of the tug was proved.

Sturgis v. *Boyer,* 65 U. S. 110 (Brief, p. 16), is not in point. It involved the question of responsibility of "navigation" as between tug and tow.

Petitioner's references (Brief, pp. 16, 28-9) to the *Delaware,* 43 F. (2d) 852 (*Delaware Dredging Co.* v. *Graham*) are rather misleading, for the Court there held that the burden of proof was on libelant and as no evidence of negligence was produced, dismissed the libel.

The Genesee, 139 Fed. 549 (Brief, p. 17), was referred to in the decision below as

"inconclusive as to the absence of a presumption arising from injury alone. The decision depended upon an inference from the evidence" (R. 416).

The Seven Sons, 29 Fed. 543 (Brief, p. 18), a decision in the District Court for the Western District of Pennsylvania in 1885 referred to in the Court below (R. 307) does not appear to be authoritative now in the 3rd Circuit and is overruled by the decisions of this Court.

Newport News Shipbuilding and Dry Dock Company v. *United States,* 34 Fed. (2d) 100 (Brief, p. 17), had nothing to do with towage. It involved a bailment under a repair contract.

Petitioner complains that

"It is a harsh rule which obligates the owners of a boat such as the *Drifter,* to specifically point out overt acts of negligence on the part of a tugboat which undertakes a contract of towage where the circumstances of damage are not explained, and which are unknown to the owner" (Brief, p. 21).

This complaint appears to be based in part upon petitioner's contention that the bargee was not present during the period when the damage took place (Brief, p. 10). On the contrary, no one knows when the damage took place (District Court opinion, R. 229, C. C. A. opinion, R. 304). The voyage started at Morris Heights, Harlem River, New York, on the morning of October 19, 1925. The tow laid up for the

night at Fisher's Dock, Bayonne, N. J., started out again in the morning of the 20th and arrived at her destination about an hour or an hour and a half later. The bargee was present during all of the towage on the first day, October 19; he left the boat unattended during the night of the 19th, and for the short period of the completion of the voyage on the morning of the 20th the boat was attended by a deckhand from the tug.

Nor is there any difference in the rule merely because a bargee does not happen to be provided. As this Court said in *The L. P. Dayton, supra:*

"Neither is it material that the facts of the case and the causes of the collision are peculiarly within the knowledge of the respondents. It is alleged in the present case, as one of the inconveniences of the libellant's situation, that it would be compelled, in order to establish the allegations of the libel, to resort to the testimony of those navigating the respective tugs, and thus call witnesses interested to exonerate the vessel to which they were attached. We are not aware, however, of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties" (p. 352).

Nor should it be overlooked that a towage contract does not contemplate the tug becoming the nurse of the tow. The latter still remains under the control of her owner's servants. It is solely for the purpose of performing the towage manœuvre that the vessels towed are under the management of the tug. In other respects, having to do with the internal management of the tow, which includes the handling of lines, upkeep and observation of damage, if and when sustained, responsibility remains on the tow. As this Court said in *The J. P. Donaldson,* 167 U. S. 599:

"It is solely for the purpose of performing the contract of towage, that the vessels towed are put under the control and management of the master of the tug. In all other respects, and for all other purposes, they remain under the control of

their respective masters; and, in case of unforeseen emergency, it is upon the master of each that the duty rests of determining what shall be done for the safety of his vessel and of her cargo" (p. 604).

Petitioner complains because when its bargee chose to go home, the tug master did not place a watchman aboard the tow (Brief, pp. 30, 34). But there was no obligation on the part of the tug to engage a watchman simply because petitioner's bargee failed to carry out instructions and remain on the tow until she arrived at her destination (R. 43). Furthermore, the petitioner's bargee acquiesced in the tow's mooring place and the protection given her. When he chose to leave the yacht over night, she remained there at the risk of her owner. In *The W. H. Baldwin*, 271 Fed. 411 (C. C. A 2d C.), the Court said:

"The bargemaster was the agent of the owner as far as the care of the barge was concerned. He acquiesced in leaving the barge in the position the tug left her. He threw the lines to the dock and sounded around the barge in attempting to determine the character of the bottom which she would rest upon. He apparently was satisfied with the position in which she was placed. These circumstances indicate that the master, and therefore the owner, took the risk of allowing the barge to remain in the position she was in when the tug had fulfilled its service" (p. 415).

II. EVEN HAD THE TUG BEEN A BAILEE AND A PRESUMPTION OF NEGLIGENCE HAD ARISEN FROM THE FACT OF DAMAGE, THE PRESUMPTION WOULD HAVE BEEN REBUTTED BY THE TESTIMONY.

We have shown above under Point I that the tug was not a bailee and that no presumption of negligence arose from the mere fact of damage. However, assuming there was a bailment and that a presumption of negligence arose, a bailee is not required to "explain" *how* the damage occurred, but only that the bailee was not guilty of neglect in the course of the bailment. The rule was recently stated by the Circuit Court of Appeals (Second Circuit), in *Cummings* vs. *Pennsylvania R. Co.*, 45 F. (2d) 152. In reversing the District Court, which had required the charterer of a barge to show "how the injury occurred", the Court remarked that this would put an added burden on a bailee, amounting to a duty to prove itself "omniscient respecting the injury." The Court said:

"Of course, this went too far in placing upon the defendant the burden of showing 'how the injury occurred,' for the presumption of negligence may be rebutted without necessarily doing that. To require it, would place the liability of the defendant, not on negligence alone as it is, *Clark* v. *United States*, 95 U. S. 539, 24 L. Ed. 518; *Tomkins Cove Stone Co.* v. *Bleakley Transportation Co., Inc. et al.* (C. C. A.) 40 F. (2d) 249, 250; *Bushey* v. *Hedger* (C. C. A.) 40 F. (2d) 417, 418, but on some added duty to prove itself omniscient respecting the injury as well as to rebut the presumption of negligence" (p. 153).

Inasmuch as no one knows when or how this damage was sustained, let us assume for the moment that it occurred while the vessel was lying at Fisher's Dock during the night, as contended by petitioner (Brief, p. 34). Then it must have been as a result of collision with some other moving

vessel or object. Certainly the tug cannot be charged with fault for such damage.

The Granite State, 3 Wall. 310.

Other assumptions could be indulged in as to how this damage occurred, but they must necessarily be mere speculation. The actual voyage is testified to by Simpson, deckhand on the tug (R. 56-78). His testimony is adequate to show what the tug did en route and that the tug was not negligent. For the convenience of the Court we set forth a brief résumé of his testimony and references to the parts of the record where it will be found, viz:

He testified that the yacht was taken in tow at Morris Heights on a hawser with the cradle astern of the yacht on a hawser (R. 60-2); that "nothing" happened until below Hell Gate, when the cradle's hawser broke and the *White City* had to go back and pick it up (R. 62-3); that the tow then proceeded down the Bay and through Kill van Kull until the steamer *Suscalanco* was passed, and the *White City* then put into Fisher's Dock at Bayonne (R. 63-4); that after telephoning for instructions, the tug master tied up the yacht for the night in "smooth water" alongside the dock with "big round rubber tires, fenders, to fend her off from the dock so that she wouldn't bang or scratch or hurt herself" (R. 63-4); that this was done "because it was getting darker just then and we thought it would be much better if we got an early start in the morning and took her out in daylight" (R. 65); that he stayed that night on the *White City* "ten or fifteen feet" from the *Drifter;* that before starting off the next morning at six or six thirty he looked over the boats and "couldn't see anything wrong". They were arranged "in tandem to go to Port Newark" which was 5 or 6 miles away. In the absence of the bargee, he

went on board the yacht and steered her to destination arriving about 7.30 or 8 A. M., and upon arrival the yacht was in the same condition as leaving Morris Heights "as far as I could see". He was later advised that when the yacht was lifted out of the water to place on the steamer, "a hole in the boat" was noticed and she was put back in the water again (R. 64-7).

That respondent was unable to supplement or corroborate Simpson's testimony was due to the death of respondent's other two witnesses, including the tug captain, and the successful efforts of petitioner's counsel in excluding the testimony of the two deceased witnesses, taken in the Municipal Court trial on the same cause of action, where the same counsel appeared and examined and cross-examined both witnesses (R. 70, 78).*

Furthermore, we cannot refrain from commenting upon petitioner's failure to produce the bargee, Weston, or to explain his non-production other than to state during the trial, "He has left the employ of the Consolidated and we can't find him" and "He is not under our control" (R. 77). Under the circumstances, it comes with ill grace from petitioner to complain because the record does not show *how* the accident occurred.

The failure to call a witness who could testify regarding the facts raises a presumption that the testimony of that witness would have been unfavorable to the case of the party failing to produce him.

In *Culbertson* v. *Shaw,* 18 How. 584, this Court said:

"The captain of the steamer was not sworn, and from this a strong presumption arises that his evidence would have been against his owners" (p. 588).

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* Exhibit H for Identification.

In *The Eastchester,* 20 F. (2d) 357 (C. C. A., 2d C.), the Court said:

"It is a rule based fairly on common sense that a failure to call a witness in such circumstances raises a presumption that he would have given unfavorable testimony if called. *The Bolton Castle,* 250 F. 403 (C. C. A. 1); *The New York,* 175 U. S. 187, 204; 20 Sup. Ct. 67, 44 L. Ed. 126" (p. 358).

See also

The New York, 175 U. S. 187, 204;
The Richmond, 275 Fed. 970; affirmed, 294 Fed. 90;
The Gulf of Mexico, 281 Fed. 77;
The Bolton Castle, 250 Fed. 403, 406;
The Fred M. Laurence, 15 Fed. 635, 636-7.

III. THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

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Dated: New York, December 31, 1931.